Lion Pacific Sdn Bhd v Pestech Technology Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(C)(A)-1554–10 OF 2020 AND B-02(C)(A)-1558–10 OF 2020
ABDUL KARIM, GUNALAN MUNIANDY AND AHMAD ZAIDI IBRAHIM JJCA
6 SEPTEMBER 2022

Building and Construction Law — Construction contracts — Adjudication — Main contractor appointed appellant as subcontractor — Appellant appointed respondent as subcontractor — High Court allowed respondent's application to enforce adjudication decision against appellant — High Court allowed respondent's application to enforce adjudication decision against appellant — High Court dismissed appellant's application to set aside adjudication decision and/or to stay enforcement of adjudication decision — High Court dismissed appellant's application to set aside adjudication decision and/or to stay enforcement of adjudication decision — Whether main contract separate from subcontract — Whether Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') inapplicable to main contract which was entered into prior to the coming into force of the CIPAA — Whether adjudicator had jurisdiction to adjudicate — Whether 'Pay-If-Certified' provision could be considered as conditional payment clause as provided under s 35 of CIPAA — Whether adjudicator failed to appreciate fundamental element of appellant's defence — Construction Industry Payment and Adjudication Act 2012 ss 5 & 35

The Government of Malaysia and Konsortium Skypark Link Sdn Bhd-Lion Pacific Sdn Bhd ('the Consortium') had entered into a contract for a construction project ('the main contract') on 22 January 2013. The Consortium subsequently appointed the appellant as the subcontractor and the appellant in turn appointed the respondent as its subcontractor via a contract dated 24 November 2014 ('the subcontract'). The respondent had filed adjudication proceedings pursuant to a payment claim ('the PC') dated 5 April 2019 issued under s 5 of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). Via an adjudication decision ('the AD'), the adjudicator had allowed the respondent's claim in part ie, for the amount of RM12,001,692.71. Subsequent thereto, the appellant had filed originating summons to set aside the AD and/or to stay the enforcement of the AD pending arbitration whereas the respondent had filed originating summons for leave of court to enforce the AD against the appellant. The learned High Court judge ('the LJ') had allowed the respondent's application and dismissed the appellant's application, hence the present appeals by the appellant. The first issue raised in the present appeals was whether the CIPAA had no application

to the subcontract as the main contract which formed an integral part of the contract between the respondent and the appellant were entered into prior to the coming into force of the CIPAA on 15 April 2014. In relation to this issue, the appellant submitted that the respondent was deemed to be a party to the main contract pursuant to cl 3.1 of the subcontract and both the contracts formed part of the same series of transactions. Under those circumstances, as the main contract came into existence before the CIPAA came into force, any payment dispute under the subcontract could not be referred to the adjudicator pursuant to the CIPAA rendering the adjudicator being devoid of jurisdiction to adjudicate the dispute. The second issue was in relation to the appellant's argument that despite the express provision in cl 4.1 of the subcontract which provided that the certification by the project director ('the PD') of the Ministry of Transportation ('the MOT') was the only document required to confirm whether the respondent had in reality completed its works and entitled to the payments, the adjudicator wrongly found that the terms of the subcontract which required the certification of the respondent's work by the PD of the MOT fell under s 35 of the CIPAA and therefore, it was void. The final issue was that the LJ had erred in not appreciating the adjudicator's failure to consider the fundamental element of the appellant's defence, namely: (a) the non-entitlement of the respondent to its claim without certification by the PD of the MOT; and (b) the certificate issued by the appellant for the sum of RM8.83m was only at the request of the respondent for the sole purpose of securing financing and not for work done which was the basis of the PC for which evaluation and certification by the approving authority was crucial.

Held, allowing the appeals, and setting aside the decisions of the LJ and the AD with costs of RM30,000 here and below subject to allocator:

(1) The CIPAA was prospective in nature, as such, it would not apply to contracts entered into prior to 15 April 2014. The appellant's proposition as to the adjudicator's lack of jurisdiction on the basis of the main contract preceding the coming into force of CIPAA was misconceived and wrong in law. Notwithstanding the nexus between the two contracts, they were still separate contracts with only one common party. The LJ had not erred in deciding that the adjudicator had jurisdiction to adjudicate the respondent's claim pursuant to the CIPAA because the respondent's claim was based on the subcontract which was concluded after the enactment of the CIPAA. All the rights and obligations of the respondent and the appellant arose solely from the subcontract. In other words, both the respondent and the appellant could only enforce the subcontract and not the main contract. The mere fact that cl 3.1 of the subcontract had incorporated all the provisions of the main contract into the subcontract, did not mean that appellant and the respondent had entered into the main contract (see paras 16 & 22).

(2) From a plain and literal reading of the wording of s 35(1) of the CIPAA, a 'Pay-If-Certified' provision as per cl 4.1 of the subcontract could not be construed as a conditional payment clause as the mutual agreement of the parties was that the appellant's obligation to make payment would only arise upon certification of the works done by the PD of the MOT failing which the works could not be considered as having been carried out. Notwithstanding the object of the CIPAA being to facilitate prompt payment, the contractual obligations of the parties as expressly agreed upon could not in principle be disregarded. Therefore, the LJ had erred in holding that cl 4.1 of the subcontract was invalidated by s 35 of the CIPAA as it went beyond the express intention of the contracting parties (see paras 36–37).

(3) It was trite that where an adjudicator had failed to take note of the main substantive defences raised before arriving at his decision, the enforcement of an AD was liable to be declined in principle. In the present case, the adjudicator had deprived the appellant of its right to adduce evidence and be heard on all the questions that arose during the adjudication. Further, the LJ had plainly fallen into error in not appreciating the adjudicator's failure to consider the fundamental element of the appellant's defence, namely: (a) the non-entitlement of the respondent to its claim without certification by the PD of the MOT; and (b) the certificate issued by the appellant for the sum of RM8.83m was only at the request of the respondent for the sole purpose of securing financing and not for work done which was the basis of the PC for which evaluation and certification by the approving authority was crucial. The court was satisfied that had the adjudicator given due consideration to the core defence and issues raised by the appellant, it would have made a material defence to the decision arrived at by him which was to a large extent was based on incorporating new terms into the contract (see paras 44-48).

(4) In the circumstances, the court concluded that this was a fit and proper case for appellate interference to correct the error of the LJ that arose primarily from insufficient judicial appreciation of the matters and facts placed before him (see para 49).

[Bahasa Malaysia summary

Kerajaan Malaysia dan Konsortium Skypark Link Sdn Bhd-Lion Pacific Sdn Bhd ('Konsortium tersebut') telah menandatangani kontrak untuk projek pembinaan ('kontrak utama') pada 22 Januari 2013. Konsortium tersebut kemudiannya melantik perayu sebagai sub-kontraktor dan perayu pula melantik responden sebagai sub-kontraktornya melalui kontrak bertarikh 24 November 2014 ('sub-kontrak'). Responden telah memfailkan prosiding adjudikasi bersandarkan kepada tuntutan pembayaran ('PC') bertarikh 5 April 2019 yang dikeluarkan di bawah s 5 Akta Pembayaran dan Adjudikasi Industri

Pembinaan 2012 ('AAIP'). Melalui keputusan adjudikasi ('AD'), adjudikator telah membenarkan sebahagian tuntutan responden iaitu, untuk jumlah RM12,001,692.71. Setelah itu, perayu telah memfailkan saman pemula untuk mengenepikan AD tersebut dan/atau untuk menangguhkan penguatkuasaan AD tersebut sementara menunggu timbang tara manakala responden telah memfailkan saman pemula untuk kebenaran mahkamah untuk menguatkuasakan AD tersebut terhadap perayu. Hakim Mahkamah Tinggi yang arif ('HMT') telah membenarkan permohonan responden dan menolak permohonan perayu, justeru rayuan-rayuan semasa oleh perayu. Isu pertama yang dibangkitkan dalam rayuan-rayuan ini ialah sama ada AAIP tidak terpakai ke atas sub-kontrak tersebut kerana kontrak utama yang menjadi sebahagian daripada kontrak antara responden dan perayu telah dimeterai sebelum penguatkuasaan AAIP pada 15 April 2014. Sehubungan dengan isu ini, perayu berhujah bahawa responden dianggap sebagai pihak kepada kontrak utama menurut klausa 3.1 sub-kontrak dan kedua-dua kontrak tersebut merupakan sebahagian daripada siri transaksi yang sama. Di bawah keadaan tersebut, kerana kontrak utama wujud sebelum AAIP berkuat kuasa, apa-apa pertikaian pembayaran di bawah sub-kontrak tidak boleh dirujuk kepada adjudikator menurut AAIP menyebabkan adjudikator tidak mempunyai bidang kuasa untuk mengadili pertikaian tersebut. Isu kedua adalah berhubung hujah perayu bahawa walaupun terdapat peruntukan nyata dalam klausa 4.1 sub-kontrak yang memperuntukkan bahawa perakuan oleh pengarah projek ('PP') Kementerian Pengangkutan ('KP') adalah satu-satunya dokumen yang diperlukan untuk mengesahkan sama ada responden sebenarnya telah menyiapkan kerja-kerjanya dan berhak menerima bayaran, adjudikator telah secara salah memutuskan bahawa syarat-syarat subkontrak yang memerlukan perakuan kerja responden oleh PP kepada KP tergolong di bawah s 35 AAIP dan oleh itu, ia tidak sah. Isu terakhir ialah HMT telah terkhilaf kerana tidak mengambil kira kegagalan adjudikator untuk mempertimbangkan elemen asas pembelaan perayu, iaitu: (a) ketidaklayakan responden terhadap tuntutannya tanpa perakuan oleh PP kepada KP; dan (b) perakuan yang dikeluarkan oleh perayu untuk jumlah RM8.83 juta hanya atas permintaan responden untuk tujuan mendapatkan pembiayaan semata-mata dan bukan untuk kerja yang dilakukan yang merupakan asas kepada PC yang mana penilaian dan perakuan oleh pihak berkuasa yang meluluskan adalah penting.

Diputuskan, membenarkan rayuan-rayuan dan mengenepikan keputusan HMT dan AD dengan kos sebanyak RM30,000 di sini dan di bawah tertakluk kepada alokator:

(1) Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 bersifat prospektif, oleh itu, ia tidak akan terpakai kepada kontrak yang dimeterai sebelum 15 April 2014. Cadangan perayu mengenai ketiadaan bidang kuasa adjudikator berdasarkan kontrak utama sebelum berkuatkuasanya

AAIP adalah salah sangka dan salah di sisi undang-undang. Walaupun terdapat pertalian antara kedua-dua kontrak, kedua-duanya masih merupakan kontrak berasingan dengan hanya satu pihak yang sama. Hakim Mahkamah Tinggi tidak terkhilaf dalam memutuskan bahawa adjudikator mempunyai bidang kuasa untuk mengadili tuntutan responden menurut AAIP kerana tuntutan responden adalah berdasarkan sub-kontrak yang telah dibuat selepas penggubalan AAIP. Semua hak dan kewajipan responden dan perayu timbul semata-mata daripada sub-kontrak. Dalam erti kata lain, kedua-dua responden dan perayu hanya boleh menguatkuasakan sub-kontrak dan bukannya kontrak utama. Fakta bahawa klausa 3.1 sub-kontrak telah memasukkan semua peruntukan kontrak utama ke dalam sub-kontrak, tidak bermakna perayu dan responden telah memasuki kontrak utama (lihat perenggan 16 & 22).

(2) Daripada pembacaan yang jelas dan literal ke atas perkataan dalam s 35(1) AAIP, peruntukan 'Pay-If-Certified' seperti dalam klausa 4.1 sub-kontrak tidak boleh ditafsirkan sebagai klausa pembayaran bersyarat kerana persetujuan bersama pihak-pihak adalah bahawa kewajipan perayu untuk membuat pembayaran hanya akan timbul apabila terdapat perakuan oleh PP kepada KP ke atas kerja-kerja yang di lakukan yang mana jika perakuan tersebut tiada kerja-kerja tersebut tidak boleh dianggap sebagai telah dijalankan. Walaupun matlamat AAIP adalah untuk memudahkan pembayaran segera, kewajipan kontrak pihak-pihak seperti yang dipersetujui secara nyata pada dasarnya tidak boleh diabaikan. Oleh itu, HMT telah terkhilaf apabila memutuskan bahawa klausa 4.1 sub-kontrak adalah tidak sah berdasarkan s 35 AAIP kerana keputusan tersebut melampaui niat nyata pihak-pihak yang berkontrak (lihat perenggan 36–37).

(3) Telah menjadi undang-undang yang mantap bahawa apabila seorang adjudikator gagal mengambil perhatian terhadap pembelaan-pembelaan substantif utama yang dibangkitkan sebelum membuat keputusannya, penguatkuasaan AD boleh ditolak pada dasarnya. Dalam kes ini, adjudikator telah melucutkan hak perayu untuk mengemukakan keterangan dan didengar mengenai semua persoalan yang timbul semasa adjudikasi. Selanjutnya, HMT secara jelas terkhilaf kerana tidak mengambil kira kegagalan adjudikator untuk mempertimbangkan elemen asas pembelaan perayu, iaitu: (i) ketidaklayakan responden terhadap tuntutannya tanpa perakuan oleh PP kepada KP; dan (ii) perakuan yang dikeluarkan oleh perayu untuk jumlah RM8.83 juta hanya atas permintaan responden untuk tujuan mendapatkan pembiayaan semata-mata dan bukan untuk kerja yang dilakukan yang merupakan asas kepada PC yang mana penilaian dan perakuan oleh pihak berkuasa yang meluluskan adalah penting. Mahkamah berpuas hati bahawa sekiranya adjudikator memberi pertimbangan yang

sewajarnya kepada pembelaan utama dan isu-isu yang dibangkitkan oleh perayu, ianya akan menjadi pembelaan material terhadap keputusan yang dibuat olehnya yang sebahagian besarnya adalah berdasarkan memasukkan terma baharu ke dalam kontrak (lihat perenggan 44–48).

(4) Dalam keadaan tersebut, mahkamah memutuskan bahawa ini adalah kes yang sesuai dan wajar untuk campur tangan rayuan untuk membetulkan kesilapan HMT yang timbul terutamanya daripada penghayatan kehakiman yang tidak mencukupi terhadap perkara-perkara dan fakta-fakta yang dikemukakan di hadapannya (lihat perenggan 49).]

Cases referred to

ABB Ltd v Bam Nuttall Ltd [2013] EWHC 1983 (TCC); 149 ConLR 172, QBD (refd)

All Malayan Estates Staff Union v Rajasegaran & Ors [2006] 6 MLJ 97, FC (refd)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

Ireka Engineering & Construction Sdn Bhd v Tri Pacific Engineering Sdn Bhd and another summons [2020] MLJU 548, HC (refd)

Jack-In Pile (M) Sdn Bhd v Bauer (M) Sdn Bhd and another appeal [2020] 1 MLJ 174; [2020] 1 CLJ 299, FC (refd)

John Holland Pty Ltd v Chidambara [2017] WASC 179; BC201705629, SC (refd)

Majlis Perbandaran Seremban v Tenaga Nasional Bhd [2020] 12 MLJ 1, FC (refd)

Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd [2006] 4 MLJ 113, FC (refd)

NKT Cables A/S v SP Power Systems Ltd 172 ConLR 121; 2017 Scot (D) 26/3 (refd)

Red Ink Homes Pty Ltd v Court [2014] WASC 52 (refd)

Smith v Chadwick (1881) 20 Ch D 27, Ch D (refd)

UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and another case [2015] 11 MLJ 499, HC (refd)

UMW Toyota Motor Sdn Bhd & Anor v Allan Chong Teck Khin & Anor [2021] 3 MLJ 107, CA (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 2, 4, 5, 12(1), 15, 25(n), 35, 35(1), (2), (2)(a), (2)(b)

Appeal from: *Lion Pacific Sdn Bhd v Pestech Technology Sdn Bhd and another case* [2020] MLJU 2308 (High Court, Shah Alam)

Sanjay Mohanasundaram (with Wong Li-Wei and Dharushini Bai) (Sanjay Mohan) for the appellant.
Rodney Gomez (with Aarthi Jeyarajah and Kevin Richard Nathan) (Shearn Delamore & Co) for the respondent.

Gunalan Muniandy JCA:

INTRODUCTION

[1] There are two appeals before us, arising from the same adjudication decision ('AD') dated 30 October 2019 following adjudication proceedings commenced by the respondent pursuant to a payment claim ('PC') dated 5 April 2019 issued under s 5 of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA'). Both appeals are by the appellant against decisions made by the learned High Court judge ('LJ') who dismissed the appellant's application to set aside and/or stay the AD and allowed the respondent's application for an enforcement order of the same AD. As both the applications were heard together by the LJ, our grounds would encompass both the High Court orders from which the present appeals emanate.

BACKGROUND FACTS

[2] By way of a letter of acceptance dated 22 January 2013, the Malaysian Government had accepted a tender submitted by Konsortium Skypark Link Sdn Bhd-Lion Pacific Sdn Bhd ('Consortium') for a construction project ('project').

[3] In the letter of award dated 7 October 2013, the Consortium appointed the appellant as a subcontractor for the system works package parcel of the project.

[4] The appellant appointed the respondent as a subcontractor for the works by way of a subcontract dated 24 November 2014 ('subcontract').

[5] The respondent claimed that a sum of RM24,902,980.45 was due from the appellant to the respondent regarding the works. The appellant disputed the respondent's claim. Hence, the respondent's claim was referred to adjudication before the learned adjudicator.

[6] The appellant disputed the respondent's claim for the reasons, amongst others, that by reason of cll 3.1 and 4.1, payment for the works shall only become due from the appellant to the respondent upon Ministry of Transport's

('MOT') certification of the payment under the main contract and the respondent's claim for variation works could not be allowed in view of cl 50 dan cl 53.

[7] The learned adjudicator delivered adjudicator decision ('AD') as follows:

(a) the learned adjudicator only allowed seven out of nine invoices which totalled RM12,001,692.71;

(b) the respondent's loss arising out of extension of time was rejected;

(c) the respondent's claim (variation works) was partly allowed wherein the respondent could only recover a sum of RM521,040 for the respondent's claim;

(d) the appellant shall pay to the respondent a total sum of RM12,522,732.71 on or before 15 January 2020; and

(e) interest and costs shall be paid by the appellant to the respondent.

[8] Both parties filed originating summonses ('OS'):

(a) OS No BA-24C-73–07 of 2020 has been filed by the appellant for the following orders: an order that AD made on 30 October 2019 by an adjudicator in favour of the respondent be set aside; and if the AD is not set aside, an order to stay the enforcement of the AD until the disposal of an arbitration between the appellant and the respondent; and

(b) the respondent filed OS No BA-24C-70–07 of 2020 for leave of court to enforce the AD against the appellant.

[9] The LJ dismissed the appellant's OS and allowed the respondent's OS. Hence, the appellant appealed to the Court of Appeal against the said decision.

OUR DECISION

[10] The appellant took a two-pronged approach to the appeals before us, namely that: on the facts and in law, the High Court should have set aside the AD and dismissed the enforcement application; alternatively, the High Court should at the very least have allowed the AD to be stayed until the disposal of the arbitration initiated by the appellant.

[11] For convenience, we would make reference to the main grounds raised by the appellant as summarised below by the respondent:

(a) CIPAA does not apply to the subcontract as the main contract which forms part of the subcontract, was entered into prior to the coming into

force of CIPAA. As such, the learned adjudicator has no jurisdiction over the adjudication proceedings between the parties ('Main Ground No 1');

(b) the learned adjudicator had acted in excess of his jurisdiction by incorporating a new contractual term into the subcontract ('Main Ground No 2'); and

(c) there are clear and/or manifest errors in the adjudication decision that warrants a stay of the adjudication decision ('Main Ground No 3').

[12] At the outset, the respondent impressed upon us that CIPAA does not provide a right to appeal against the decision of the learned adjudicator, which in this instance was largely based on findings of fact and appreciation of the evidence adduced, and may only be set aside in very limited circumstance as provided under s 15 of the CIPAA.

[13] As regards Main Ground No 1, the appellant's contention was that CIPAA had no application to the subcontract as the main contract which forms part of the subcontract, was entered into prior to the coming into force of CIPPA. As such, that the LJ had erred in law and/or in fact by failing to appreciate that the learned adjudicator has no jurisdiction over the adjudication proceedings between the parties.

[14] In pressing for the AD to be declared a nullity for want of jurisdiction on the part of the adjudicator to conduct the adjudication proceedings, the appellant relied on the following factors:

(a) the respondent is fully aware that the contract entered into between the Government of Malaysia and the Consortium and the contract entered into between the Consortium and the appellant were entered prior to CIPAA coming into force;

(b) the term and condition ('T&C') of the main contract and equally applicable to the subcontract between the respondent and the appellant pursuant to the T&C of subcontract;

(c) under the subcontract, the respondent was made a party to the main contract which means that the main contract applies to all disputes between the parties to the subcontract; and

(d) as the respondent had knowledge that the main contract applied to both the above parties, the respondent is deemed to be a party to the main contract.

[15] The question then that calls for our determination on the threshold jurisdiction point is whether CIPAA has no application to the subcontract as

the main contract which forms an integral part of the contract between the respondent and the appellant were entered into prior to 15 April 2014, ie on 22 January 2013 (the date of the letter of acceptance in the main contract). A

[16] It is indisputable that CIPAA would not apply to contracts entered into prior to 15 April 2014 as held by the Federal Court in *Jack-In Pile (M) Sdn Bhd v Bauer (M) Sdn Bhd and another appeal* [2020] 1 MLJ 174; [2020] 1 CLJ 299. In short, that CIPAA 2012 is prospective in nature. B

[17] The appellant's proposition was that based on the express terms of the subcontract, the subcontract and the main contract are to be construed as one transaction given the back-to-back application of the main contract. In this regard, we refer to *The Interpretation of Contracts* (6th Ed) at para 3.03: C

> In such cases, where the transaction is in truth one transaction, all the contracts may be read together for the purpose of determining their legal effect. D

[18] Where documents are shown to be contemporaneous, a series of the deeds are entered into between the contracting parties, the deeds in principle represent a single transaction between them and ought to be treated as one deed (see *Smith v Chadwick* (1881) 20 Ch D 27). E

[19] In essence, the thrust of the appellant's case was that the respondent is deemed to be a party to the main contract pursuant to cl 3.1 of the subcontract and both the contracts formed part of the same series of transactions. That being the case, as the main contract came into existence before CIPAA came into force, any payment dispute under the subcontract cannot be referred to the adjudicator pursuant to this Act rendering the adjudicator being devoid of jurisdiction to adjudicate the dispute. Therefore, that the LJ had come to an erroneous finding that the adjudicator was seized with jurisdiction to decide the payment claim submitted by the respondent which the appellants disputed. F G

[20] In support to the LJ's finding on jurisdiction, the respondent contended that the date when the main contract was entered into is irrelevant to the adjudication proceedings and that the date of the subcontract, which is 24 November 2014 should be the only relevant date for consideration as to whether CIPAA applies as the adjudication proceedings arose out of the subcontract. The appellant's contention, hence, holds no weight given the fact that the adjudication proceedings were initiated under the subcontract that was entered into on 24 November 2014, a date well after CIPAA was passed on 15 April 2014. H I

[21] Our attention was also drawn to recital 2 of the subcontract a plain reading of which made it clear that the offer was only made to the respondent

on 24 November 2014 and pursuant to 'subsequent negotiations', the works were then awarded to the respondent. Thus, the subcontract came into effect only on 15 April 2014 and it was a contract within the meaning of s 2 of the CIPAA, particularly that it was a construction contract made in writing.

[22] For the reasons put forth by the respondent, we were in agreement with its contention that the appellant's proposition as to the adjudicator's lack of jurisdiction on the basis of the main contract preceding the coming into force of CIPAA was misconceived and wrong in law. Notwithstanding the nexus between the two back-to-back contracts, our considered view is that they are separate contracts with only one common party. The LJ had not erred in deciding that the adjudicator had jurisdiction to adjudicate PT's claim pursuant to CIPAA because PT's claim was based on the subcontract which was concluded on 24 November 2014 (after the enactment of CIPAA). All the rights and obligations of PT and LP arose solely from the subcontract (not the main contract). In other words, both PT and LP could only enforce the subcontract (not the main contract). The mere fact that cl 3.1 had incorporated all the provisions of the main contract into the subcontract, did not mean that LP and PT had entered into the main contract. PT and LP are the initials used by the LJ for the respondent and appellant respectively.

[23] We will now proceed to consider the second main ground of appeal relating to the adjudicator having purportedly exceeded his jurisdiction by incorporating a new non-existent contractual term into the subcontract to the detriment of the appellant. He was alleged to have acted in excess of his jurisdiction by considering purportedly irrelevant matters when he unilaterally advocated and decided that the certification mechanism as agreed between the parties is a mechanism which is prohibited by s 35 of the CIPAA. Amongst others, the appellant also contended that pursuant to the subcontract, the certification by the Government of Malaysia, via the Ministry of Transportation ('MOT') is required prior to any payment to the respondent.

[24] The appellant stressed that both parties had expressly agreed to the provision that the certification by the project director of the MOT is the only document required to confirm whether the respondent had in reality completed its works (cl 4.1 of subcontract) and whether the respondent is entitled to be paid. Reproduced below is the relevant extract from cl 4.1 of the subcontract:

> Verification and approval by ICC-MOT 15th–24th every month. payment to subcontractor 40 days after certification by MOT.

[25] It was contended that despite this express provision, the adjudicator wrongly found that the terms of the subcontract which require the certification of the respondent's work by the project director of MOT ('PD') falls under s 35

of the CIPAA and therefore, it is void.

[26] Section 35 of the CIPAA prohibits conditional payment as follows:

> (1) Any conditional payment provision in a construction contract in relation to payment under the construction contract is void.

[27] The question before us was whether the adjudicator, as the appellant urged us to take note of, had completely 'disregarded the aforesaid express contractual term requiring certification by the PD of the MOT. Importantly too, whether the said certification was purely to determine the works carried out by the plaintiff and should not be regarded as a provision for conditional payment.

[28] We are in agreement with the position taken by the appellant that the above questions on the issue at hand should be answered in the affirmative. The appellant's further contention that found favour with us is that, nevertheless the adjudicator had proceeded to make a determination based on his inaccurate and/or erroneous conclusion or interpretation that s 35 of the CIPAA applies to not just 'pay when paid' provision but also to 'pay when certified' provision.

[29] Our view is that the arbitrator had clearly misconstrued the intention and purpose of s 35 of the CIPAA. In the result, he had, as submitted by the appellant made a flawed decision that cl 4.1 cannot apply despite this cl not being a pay when paid provision. Applying s 35 of the CIPAA to cl 4.1 of the subcontract is tantamount to a jurisdictional error or an exercise of powers in excess of jurisdiction. His approach to contractual interpretation was indeed arbitrary and fundamentally wrong that manifested as a clear misapprehension of his powers and functions (see *Red Ink Homes Pty Ltd v Court* [2014] WASC 52).

[30] The adjudicator's misconstruction of the term 'pay when certified' as being 'pay when paid' which is prohibited as a conditional payment under s 35 of the CIPAA also amounted to the incorporation of a new contractual term into the subcontract to which the parties had not mutually agreed. It is plain to us that the adjudicator did not have the jurisdiction to take it upon himself to incorporate any new contractual term or condition into the contract in question between the parties to the adjudication. Refence was rightly made to the decision of the Supreme Court of Western Australia in *John Holland Pty Ltd v Chidambara* [2017] WASC 179, where the Australian court quashed the adjudicator's determination on the ground that the adjudicator failed to have proper regard to the terms of the construction contract.

[31] In our view, the payment dispute must be determined strictly within the confines of the subcontract wherein its terms and conditions did not call for the adjudicator to make a determination on a purported 'pay when paid' clause which we note was non-existent.

[32] We also upheld the submission of the appellant that contrary to the respondent's allegation, there was no default by the appellant in making payment to the respondent as the appellant is only obliged to make payment to the respondent upon certification or approval by the PD of the MOT evidenced by a certificate signed by the him. This is expressly provided in cl 4.1 of the subcontract to which the High Court ought to have given effect as a mutually agreed term.

[33] In his analysis of the law applicable to the issue at hand, the LJ dealt with two conflicting views expressed by the Malaysian courts as to whether the effect of s 35(1) of the CIPAA is limited by s 35(2)(a) and (b) of the CIPAA ('first view') as decided in *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and another case* [2015] 11 MLJ 499; or whether the effect of s 35(1) is not confined by s 35(2)(a) and (b) as expressed in several High Court decisions, the latest being *Ireka Engineering & Construction Sdn Bhd v Tri Pacific Engineering Sdn Bhd and another summons* [2020] MLJU 548.

[34] It was the second view that found favour with the LJ for, inter alia, these reasons:

(a) there is nothing in s 35(1) of the CIPAA which limits its effect to the two circumstances specified in s 35(2)(a) and (b) of the CIPAA. On the contrary, Parliament has employed a wide term 'any' in s 35(1) of the CIPAA. The broad meaning of the word 'any' has been explained by the following judgement of the Federal Court delivered by Augustine Paul FCJ in *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113 at paras 41 and 42;

(b) if I have accepted the first view, this will render redundant the wide term 'any' in s 35(1) of the CIPAA — please refer to the judgment of Augustine Paul FCJ in the Federal Court case of *All Malayan Estates Staff Union v Rajasegaran & Ors* [2006] 6 MLJ 97 at pp 600–601;

(c) the opening words of s 35(2) of the CIPAA clearly shown that the two instances of conditional payment provision in s 35(2)(a) and (b) of the CIPAA cannot limit the wide effect of the term 'any' in the preceding sub-section;

(d) the adoption of the second wiew is in harmony with an adjudicator's wide power under s 12(1) read with s 25(n) of the CIPAA to 'decide or

declare on any matter notwithstanding no certificate has been issued in respect of the matter' (adjudicator's s 25(n) power). Reference made to the Federal Court case of *Majlis Perbandaran Seremban v Tenaga Nasional Bhd* [2020] 12 MLJ 1, at para 32, Zaleha Yusof FCJ has applied the rule of harmonious construction of statutory provisions. Acceptance of the first view that s 35(1) of the CIPAA does not invalidate a contractual provision which stipulates that payment for 'construction work' (as defined in s 4 of the CIPAA) is conditional upon certification ('Pay-If-Certified' provision), a 'non-paying party' (as understood in s 4 of the CIPAA) can resist a lawful claim for payment for construction work merely on a 'Pay-If-Certified' provision will not be in harmony with s 12(1) read with s 25(n) of the CIPAA but instead will render nugatory the adjudicator's s 25(n) power; and

(e) it is not disputed that the object of CIPAA is to ensure that parties who perform construction work are not deprived of cash flow (the life-blood of the construction industry).

[35] Lastly, the LJ held that the acceptance of the first view would be contrary to the object of CIPAA by enabling a non-paying party to dispense with payment for work done by inserting a conditional payment provision beyond the reach of s 35(2)(a) and (b) of the CIPAA. Thereafter, the LJ's conclusion on cl 4.1 of the subcontract was as follows:

(a) the subcontract is a commercial contract which should be construed in a commercially sensible manner, please see the Federal Court's judgment delivered by Gopal Sri Ram FCJ in *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 at para 10;

(b) on a commercially sensible construction of cl 4.1, it is clear that cl 4.1 is a 'Pay-If-Certified' provision; and

(c) applying the second view (as explained in the above paras 19 and 20), cl 4.1 is invalidated by s 35(1) of the CIPAA. As such, the learned adjudicator did not err in his construction of cl 4.1

[36] Regardless of whether the first or second view is accepted as alluded to by the LJ, we maintain our opinion that from a plain and literal reading of the wording of s 35(1) of the CIPAA a 'Pay-If-Certified' provision as per cl 4.1 of the subcontract cannot be construed as a conditional payment clause as the mutual agreement of the parties was that the appellant's obligation to make payment would only arise upon certification of the works done by the PD of the MOT failing which the works cannot be considered as having been carried out. That much is pure and simple. Notwithstanding the object of CIPAA being to facilitate prompt payment, the contractual obligations of the parties as

A expressly agreed upon cannot in principle be disregarded.

[37] For the reasons elucidated above, our conclusion on the issue at hand is that the LJ had erred in holding that cl 4.1 of the subcontract is invalidated by s 35 of the CIPAA as it went beyond the express intention of the contracting parties. We concur with the appellant's submission that whilst CIPAA was intended to alleviate cash flow problems of contractors and in doing so, it prohibited conditional payments, it was clearly not intended to replace the certification or valuation to assess the progress of works carried out by the relevant authority for payment to be affected.

[38] Next for our deliberation is the last core issue which concerns the purported denial of natural justice to the appellant by the adjudicator. It was premised on the adjudicator's failure to appreciate that there was an absence of the certification from the PD of the MOT and proceeding to make an award in favour of the respondent, premised on a 'pay when paid' clause. It was contended that the adjudicator had, thus, unilaterally incorporated new terms into the contract between the parties.

[39] The adjudicator was said to have based his decision on a 'pay when paid' clause which was never in existence and never agreed upon by the parties. Importantly, it would appear that the appellant was never asked to address the proceeding on this issue that was material to the adjudicator's final decision.

[40] The appellant impressed upon us that the parties ought to have been afforded a right to be heard on the following key issue:

(a) whether the 'pay when certified' clause in the subcontract ie cl 4.1, is equivalent to 'pay when paid' in s 35 of the CIPAA?

(b) whether s 35 of the CIPAA would affect the contractual right of the parties?

(c) whether the parties have always acted pursuant to cl 4.1 of the subcontract?

[41] A case in point brought to our attention was *ABB Ltd v Bam Nuttall Ltd* [2013] EWHC 1983 (TCC); 149 ConLR 172 where it was concluded that:

> [41] I therefore have no doubt that there was a serious breach of the rules of natural justice by the adjudicator who decided a key issue in the adjudication by reference to and in reliance upon a cl 11.1A which neither party had referred to or relied upon and which the adjudicator did not give the parties the opportunity to address him on. It is not for the court to speculate why the adjudicator did what he did ...

[42] In essence, the alleged denial of natural justice by the adjudicator was centred on his failure to give recognition and importance to the terms of the subcontract wherein the mandatory certification by PD of the MOT was a significant feature that had been agreed to for entitlement of payment to the contractor. The importance and relevance of the certificate by the PD had apparently not given weight to and further, that in the absence of the certificates, the sums claimed would not be payable. It was contended that, to our minds was not without basis, that had the adjudicator given proper consideration to the certification (or lack of) by the project director of the Ministry of Transport he would have held that no sums are payable to the respondent.

[43] Also highlighted to us, amongst others, was the fact that the adjudicator had failed to give consideration to the defence raised by the appellant in respect of the certificate issued for the loss and expense claim arising from the extension of time No 1 amounting to RM8.83m whereas its defence was that this certificate that was issued by the appellant was as a result of the request made by the respondent to obtain additional financing. This was not a certificate issued by the project Director of the MOT within the meaning of cl 4.1 of the subcontract. This fact as to the purpose of the said certificate by a letter dated 26 October 2021 from the Consortium regarding their meeting held on 28 September 2017 with the appellant and the respondent.

[44] Where an adjudicator has failed to take note of the main substantive defences raised before arriving at his decision, the enforcement of an AD is liable to be declined in principle. In the English case of *NKT Cables A/S v SP Power Systems Ltd* 172 ConLR 121; 2017 Scot (D) 26/3, it was held:

> This ground adds little to the ground of challenge just discussed. The adjudicator either failed to deal with most of the substantive defences or, if these were considered, the adjudicator wholly failed to state that he had done so or to explain why he had rejected them. I do not accept that the passages relied on by Mr MacColl do demonstrate that the adjudicator had addressed himself to these substantive defences.

[45] Likewise, in this instance, we have been shown that the adjudicator in the process of arriving at his AD had demonstrably failed to carefully consider and appreciate the main substantive defences of the appellant that we have adverted to. There was, thus, possibly a valid defence to the respondent's claim which it was incumbent for adjudicator to seriously consider.

[46] We are not inclined to agree with the LJ that based on the AD the adjudicator had considered all the defences raised by the appellant notwithstanding that some of the defences had been accepted by him. Neither

that he had not deprived the appellant of its right to adduce evidence and be heard on all the questions that arose during the adjudication.

[47] On the contrary, we concur with the appellant's position that the LJ had plainly fallen into error in not appreciating the adjudicator's failure to consider the fundamental element of the appellant's defence, namely: the non-entitlement of the respondent to its claim without certification by the PD of the MOT; and the certificate issued by the appellant for the sum of RM8.83m was only at the request of the respondent for the sole purpose of securing financing and not for work done which was the basis of the payment claim for which evaluation and certification by the approving authority was crucial.

[48] We are satisfied that had the adjudicator given due consideration to the core defence and issues raised by the appellant, it would have made a material defence to the decision arrived at by him which was to a large extent was based on incorporating new terms into the contract.

CONCLUSION

[49] In the circumstances, our conclusion would be that this is a fit and proper case for appellate interference to correct the error of the LJ that arose primarily from insufficient judicial appreciation of the matters and facts placed before him (see *UMW Toyota Motor Sdn Bhd & Anor v Allan Chong Teck Khin & Anor* [2021] 3 MLJ 107).

[50] We accordingly, made the following order at the end of this appeal:

> We find merit in both appeals. It is our considered view that the learned judge had erred in law in dismissing the appellant's application to set aside the adjudicator's decision dated 30 October 2019 and allowing the respondent's application to enforce the adjudicator's decision as the judgment of the High Court. We therefore allow both appeals and set aside the decision of the learned judge and the adjudicator's decision with costs. Costs of RM30,000 for both appeals here and below subject to allocator.

Appeals allowed; decision of LJ and AD set aside with costs of RM30,000 here and below subject to allocator.

Reported by Dzulqarnain Ab Fatar